Supreme Court, U. S.
FILED
JUN 9 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1933

LEE T. WESLEY,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

On Application for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

JAMES A. McPHERSON
McPHERSON, WEBER & ZAINEY
Attorney for Petitioner
419 Carondelet Street
New Orleans, LA 70130
Telephone: (504) 581-1973

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No.

LEE T. WESLEY,

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PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

The petitioner, Lee T. Wesley, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings without an opinion on March 21, 1980, in the cause entitled and numbered *United States v.*

Lee T. Wesley, et al., No. 79-5210 of the Docket of the Fifth Circuit Court of Appeals.

OPINIONS BELOW

The judgment of the United States District Court for the Western District of Louisiana was affirmed without opinion pursuant to Fifth Circuit Local Rule 21, a copy of the said judgment appearing herein at Appendix A, *infra*, p. 1a.

There are no relevant written opinions of the United States District Court for the Western District of Louisiana, the Court in which the retrial of this cause and the hearing of the motion to strike was had.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 21, 1980. *See* Appendix A, *infra*, p. 1a. No petition for rehearing was presented to the Court below. This petition for a writ of certiorari is timely filed within the period allowed following the enlargement of time allowed by Honorable Lewis F. Powell, Jr., Circuit Justice, to and including May ____, 1980. A copy of the original Order extending the time for filing this petition is annexed hereto as Appendix B, *infra*, p. 2a.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether prejudicial error was committed when the Trial Court failed to strike the allegations relative to motive which were added to the superseding indictment on the ground that same were prejudicial surplusage.

2. Whether prejudicial error was committed when the Trial Court failed to strike the Overt Acts D and I on which each of the defendants had been acquitted on one of the substantive offenses charging the same conduct as that which appeared in the alleged overt act, thereby placing defendants in double jeopardy on the conspiracy charge for acts which the first jury had found by implication were not overt acts of the alleged conspiracy.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, in relevant part, provides:

> * * * not shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *.

Rule 7(d), F.R.Cr.P., provides:

> The court on motion of the defendant may strike surplusage from the indictment or information.

STATEMENT OF THE CASE

This is a criminal case brought under 18 U.S.C. §371 and 42 U.S.C. §2971(f), relative to conspiracy to misapply federal funds and misapplication of federal funds, respectively.

The United States District Courts for the Middle and Western Districts of Louisiana had jurisdiction of these proceedings under 18 U.S.C. §3231. The Court of Appeals for the Fifth Circuit had jurisdiction of the direct appeal from the judgment of the United States District Court for the Western District of Louisiana, in which this cause was retried, under 28 U.S.C. §§1291 and 1294(1).

Petitioner and his co-defendant, Kent J. Smith, Jr., were indicted and charged originally with one count of conspiracy to misapply the funds of Community Advancement, Inc. (CAI), a partially OEO-funded community action program in Baton Rouge, Louisiana. Six overt acts were alleged, five of which were also alleged to have been substantive violations of 42 U.S.C. §2971(f). Each of the defendants were charged in each of the substantive offenses and they were also each named in the Overt Acts as having committed same.

The original indictment charged only petitioner and his co-defendant as conspirators. After a trial of the original indictment in the Middle District of Louisiana, Kent J. Smith was acquitted of the substantive offense

alleged in Count II relative to an alleged willful overpayment of H&B of Louisiana, Inc. (H&B) for the printing of a brochure relative to the available services and operations of the Council on Aging, a division within CAI. At that trial, petitioner was acquitted of the substantive offense alleged in Count VI of the original indictment relative to the purchase by CAI from H&B, a local minority-owned public relations firm, several shipments of computer paper at prices higher than the local market price for such items. Petitioner and his co-defendant were convicted of the conspiracy count and each of the other substantive offenses with which they were jointly charged.

Because of prosecutorial misconduct dur ng the closing arguments in the first trial, Honorable E. Gordon West, Senior United States District Judge who presided at the trial of the original indictment, set aside the verdit and granted a new trial.

Prior to the retrial of this cause, the Government obtained a superseding indictment from the Grand Jury sitting in and for the Middle District of Louisiana. There were only a few variations in the superseding indictment from the terms of the original indictment, each of which, we respectfully submit, were added to aid the Government to accomplish some impermissible objective with the sole exception of the deletion of the names of the defendants from the counts of which they

were individually acquitted.[1] The original indictment had charged that defendants conspired "among themselves." The superseding indictment charged that they conspired with each other and "other persons known and unknown to the Grand Jury." The Government, in order to aid its argument to the prospective jury which would retry this case, added allegations which imputed to defendants the motive of making overpayments to H&B in order to pay off political debts of petitioner to two State Representatives who allegedly assisted petitioner to obtain his position as Executive Director of CAI. Beyond merely attempting to argue its case through the indictment which, according to local practice and procedure, would be read to the jury on several occasions,[2] the Government, in an attempt to influence the jury to believe its newly contrived theory of the defendants' alleged motive, knowingly juxtaposed allegations in the indictment that within days after receiving designated funds from CAI Henry Baptiste, the principal officer of H&B, withdrew $12,-151.70 in cash and used that money to make payments on notes for the two State Representatives, an attorney named Walter Dumas, and several notes owed by Henry Baptiste. The case agent, and hence

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1 As to these counts, the Government persisted in urging the equivalent alleged overt acts done in furtherance of the conspiracy, naming both defendants in the charged overt acts.

2 The indictment is read at least during the *voir dire* examination of the jurors and again during the jury instructions. It is sometimes read during opening statement and argument by the prosecutor as well as being read sometimes when the trial is first commenced.

presumably the United States Attorney's Office, knew that the undisclosed amount of funds received from CAI were grossly inadequate to have been legitimately regarded as having been used to pay off the said notes. More importantly, the Government well knew that the said funds were withdrawn almost immediately after Baptiste deposited a substantially larger check obtained from an independent source which had been received in payment of a public relations job performed by H&B through Henry Baptiste. Moreover, through the grand jury testimony, the Government also knew that the reason why Baptiste made the payments on the notes signed by the two State Representatives and Mr. Dumas was because all of them were joint obligors upon the said notes and the two State Representatives had made substantial payments on behalf of Baptiste and Dumas to eliminate arrearages on their notes in order to prevent the bank from calling for full immediate payment of the notes upon which Baptiste and Dumas were the principal obligors but the two State Representatives were liable as guarantors.

After the superseding indictment was returned, petitioner moved to strike, as prejudicial surplusage, the allegations relative to the defendants' alleged motive and also sought to have Overt Acts D and I stricken from the indictment on the ground of their prior acquittal of the equivalent substantive offenses which, in effect, constituted a special verdict by the jury that the said overt acts were not done in furtherance of the alleged conspiracy. The Government agreed to

strike the names of the defendants from the respective overt acts which corresponded to the counts on which they had been acquitted but objected to striking the entire allegation of the alleged overt act as an overt act of the alleged conspiracy. The Trial Court held that the Government's position was correct and refused to strike the allegations relative to defendants' alleged motive and the allegations contained in Overt Acts D and I.

A trial of the superseding indictment was had and petitioner was convicted of all counts upon which he was then charged. Overt Acts D and I were submitted to the jury and the jury was instructed that it was not necessary for the jurors to find that the defendants, or either of them, committed all of the alleged overt acts, so long as they could find that some overt act was committed in furtherance of the alleged conspiracy. Thus, petitioner was subjected to a second jeopardy following his acquittal of the substantive offenses corresponding to Overt Act I and after the prior jury had determined that Overt Acts D and I were not done in furtherance of the alleged conspiracy by virtue of the acquittal of Smith on Count II and petitioner on Count VI of the original indictment.

The Trial Court sentenced petitioner to a two year term of supervised probation, conditioned upon the requirement that petitioner contribute 150 hours of voluntary community service in an approved community service program. Following the affirmance

without opinion of the judgment of the District Court, petitioner has commenced serving his two year probation and is presently contributing his time in service of the community.

REASONS FOR GRANTING THE WRIT

The Rulings Of The District Court Refusing To Strike Prejudicial Surplusage From The Indictment In This Case Present Important Questions Of Federal Law Which Have Not Been, But Should Be, Settled By This Court.

Rule 7(d), F.R.Cr.P., provides that the district court "on motion of the defendant may strike surplusage from the indictment or information." The Advisory Committee Note following Rule 7(d) says (18 U.S.C.A. Rules 1-9, pp. 389-390):

> This rule introduces a means of protecting the defendant against immaterial or irrelevant allegations in an indictment or information, which may, however, be prejudicial. The authority of the court to strike such surplusage is to be limited to doing so on defendant's motion, in the light of the rule that the guaranty of indictment by a grand jury implies that an indictment may not be amended. *Ex parte Bain*, 121 U.S. 1 [(1887)]. By making such a motion, the defendant would, however, waive his rights in this respect.

Despite the importance of this Rule, especially in view of the recent tendency toward vague prolixity in indictments charging so-called "white collar crimes" and offenses relating to the management of governmental affairs and property instead of the "plain, concise and definite written statement of the essential facts constituting the offense charged" [Rule 7(c)(1), F.R.Cr.P.]; and despite the absence of any guidelines for the exercise of distretion by district judges in the Rule or Advisory Committee Note, this Court has never undertaken the task of accepting a case for review and enunciating standards to which the trial courts should conform in exercising their apparently vast discretion granted by Rule 7(d), F.R.Cr.P.

A. *The Prejudicial Allegations Relative to Motive*

This case demonstrates the problem faced by defendants and trial judges alike in the administration of criminal justice under Rule 7(d), F.R.Cr.P., when the Government abuses the latitude of Rule 7(c)(1), F.R.Cr.P., and goes beyond the allegation of the essential facts and includes prejudicial allegations in the indictment which reach the jury on several occasions, including at least the voir dire examination of prospective jurors or the commencement of the trial and during the jury instructions. More egregious than a simple case where the Government includes allegations it hopes to prove by relevant and competent evidence, *e.g.*, *Boushea v. United States*, 173 F.2d 131 (8 Cir. 1949); *United States v. Wheaton*, 463 F.Supp. 1073 (SD NY 1979); *United States v.*

Enger, 472 F.Supp. 490 (D NJ 1978), or one in which some theory of the Government might not be admissible and the district judge decides to strike the surplusage from the indictment, *e.g.*, *United States v. Mandel*, 415 F.Supp. 997 (D Md. 1976), this case involves a false allegation of motive of the defendants, *i.e.*, the repayment in money of a political debt allegedly owed two State Representatives the Government claimed were instrumental in securing for petitioner his position as Executive Director of CAI, which the case agent, at least, knew to be false because he had traced the flow of funds in the checking account belonging to H&B and knew that the source of the funds out of which Henry Baptiste made payments on the notes owed by the two State Representatives and another was not CAI. The grand jury and United States Attorney's Office were apprised that the notes on which Baptiste made substantial payments were the product of a novation of a previously unsecured note owed by Sports Unlimited, Inc., which was divided four ways and each of the stockholders, including Baptiste, the two State Representatives and the attorney who formed the corporation, signed a note for one-fourth of the amount of the total of the Sports Unlimited note and co-signed the notes of each of the other principals of that corporation. Petitioner was not associated in any way with Sports Unlimited. The allegation of the false motive of the petitioner was highly prejudicial to the petitioner. Were there adequate standards enunciated by the Fifth Circuit or this Court for the application of Rule 7(d), F.R.Cr.P., we respectfully submit that petitioner's

motion to strike would have been granted and the needless prejudice suffered by him would have been avoided.

Petitioner was prejudiced by the allegation in the indictment of the false motivation attributed to him. The fact evidence was adduced on cross-examination of the Government witnesses and upon direct examination of defense witnesses which disproved the motive attributed to petitioner did not cure the prejudicial effect of having the trial judge read the alleged motive to the jury several times during the course of the trial. As an allegation of the petitioner's motive, it was not an essential element of the charged offense. Rule 7(c)(1), F.R.Cr.P. Rather, it was the improper utilization of the Court to assist the prosecution and argue to the jury the motivation the Government desired to have the jury attribute to the petitioner. Such allegations had no place in the indictment, hence were surplusage, and they were prejudicial for the forementioned reasons. Clearly, the motion to strike the allegations of motive should have been granted in this case. Moreover, in light of the provisions of Local Rule 21, Fifth Circuit Rules, which provides that a judgment will not be rendered without an opinion when the rendering of an opinion would have precedential value, is violated by the rendering of a judgment without opinion in this case since the Fifth Circuit has absolutely no precedent at all upon the interpretation or guidelines to be applied by district judges in administering the provisions of Rule 7(d), F.R.Cr.P.

B. *The Prejudicial Allegations Relative to the Overt Acts Which Charged Corresponding Conduct of Which Petitioner was Acquitted in the Substantive Counts on a Prior Trial.*

Count II of the indictment and Overt Act D of Count I of the indictment dealt with identical acts. Count VI of the indictment and Overt Act I of Count I of the indictment charged the same acts. Kent J. Smith, Jr., was acquitted of the offense alleged in Count II while the jury convicted him of conspiracy under Count I. Petitioner was acquitted of the offense charged in Count VI but convicted of the conspiracy charged in Count I. Since the jury found that petitioner did the act in Count II but that his only alleged co-conspirator was not also guilty, the only rational conclusion is that the jury concluded that Count II was not an act done in furtherance of the conspiracy the jury did find to exist. The same may be said with regard to the jury's finding that Kent J. Smith did the act charged in Count VI of the indictment.

In the superseding indictment filed after the first trial, the Government alleged that Overt Acts D and I were acts done in furtherance and to accomplish the objective of the conspiracy. The indictment did not name the co-defendant in the substantive count which corresponded to that overt act because the previous jury had acquitted him of that count. The indictment did not name petitioner in the substantive count of which he had been previously acquitted but did name him in connection with the corresponding overt act.

When petitioner moved to sever Counts II and VI of the superseding indictment for trial because those acts were not acts done pursuant to the conspiracy and hence not properly joined as held by the Fifth Circuit in *United States v. Marrionneaux*, 514 F.2d 1244 (5 Cir. 1975), the Court severed the two substantive offenses and struck the name of the acquitted defendant from the corresponding alleged Overt Act. The trial court, however, did not strike the two overt acts.

In *United States v. Sarno*, 456 F.2d 875, 878 (1 Cir. 1972), the Court was presented with an indictment which charged only two overt acts, one of which was the meeting at which the agreement was formulated and could not legally be regarded as an overt act of the conspiracy. The defendant there contended that the jury could have convicted him of conspiracy solely on the evidence of his agreement. The Court made the following analysis which we contend is relevant here (456 F.2d at 878):

> * * * Both the uncontroverted evidence on overt act two and the guilty verdict on the substantive count indicate that the jury found overt acts other than the agreement. * * * Since the substantive crime was the object of the conspiracy, the jury was in essence required to find that the defendant committed an overt act in furtherance of the scheme to smuggle drugs in order to return a guilty verdict on the substantive count. Any possible

> confusion on overt act one was therefore vitiaged. * * *

The situation in the present case is more complex than that in *Sarno*, but we submit the First Circuit's reasoning in *Sarno* is applicable to this case and should have been followed by the Fifth Circuit and the district court in this case. In order to have acquitted on Count II of the indictment, especially since Judge West instructed the original jury in accordance with *Pinkerton v. United States*, 328 U.S. 640 (1946), holding that a person who is shown to be a member of a conspiracy may be convicted of any substantive offense which is committed pursuant to the conspiracy. The obvious import of the jury's findings that Smith was not guilty of the substantive offense charged in Count II and that petitioner was not guilty of the substantive offense charged in Count VI was that neither of those acts were committed pursuant to the alleged conspiracy. The suggestion of the *Sarno* case that a jury's findings with regard to a substantive offense acts as a speical verdict regarding the overt acts of the conspiracy is required by this Court's holding in *Pinkerton*. The Trial Court should have ordered that Overt Acts D and I be stricken. The judgment without opinion of the Fifth Circuit, affirming the judgment of the district court without any explanation for its conclusion, conflicts with this Court's opinion in *Pinkerton* and the First Circuit's opinion in *Sarno*.

This Court has never considered the precise question presented by this case since holding in *Pinkerton* that a

member of the conspiracy may be convicted of any substantive offense which is committed pursuant to the conspiracy, *i.e.*, the effect of an acquittal of a substantive offense upon the corresponding overt act of the conspiracy count when the defendant has been acquitted of the substantive offense at a prior trial. Such a situation is subject to arise at any retrial of a conspiracy case after there has been a new trial awarded and there was an acquittal of one or more defendants of one or more substantive offenses which were also alleged overt acts of the conspiracy. This case therefore presents an important question of federal criminal law which has not been, but should be, decided by this Court.

The judgment without opinion of the Fifth Circuit also conflicts with this Court's opinion in *Ashe v. Swenson*, 397 U.S. 436 (1970), which decided that once a fact had been found against the government in a criminal trial it could not be relitigated in related criminal proceedings. It is petitioner's view that the acquittal of Smith on Count II and himself on Count VI of the indictment conclusively determined that the corresponding overt acts alleged in the indictment could not be reasserted in the superseding indictment without violating the Fifth Amendment to the Constitution, as construed in *Ashe v. Swenson, supra*. The inclusion of Overt Acts D and I in the superseding indictment permitted the second jury to redetermine whether the conduct previously determined not to have been done in furtherance of the alleged conspiracy was in fact done in furtherance thereof.

Permitting the Government to relitigate whether the conduct charged in Overt Acts D and I was done in furtherance of the alleged conspiracy affected the entire case and subjected petitioner to the violation of the Fifth Amendment privilege against double jeopardy. The jury could have found that a conspiracy existed on the basis of Overt Acts D and I. From the *Pinkerton* rationale which permits the jury to convict all members of a conspiracy for acts done by their co-conspirators during the pendency of the conspiracy, the jury was thus permitted to find the guilt of petitioner on Counts III, IV and V. Since the doctrine of collateral estoppel was not applied in this case to strike Overt Acts D and I from the indictment, there is no way to determine from the general verdict on the conspiracy and substantive counts whether the relitigation of Overt Acts D and I contributed to the finding of guilt on the conspiracy and other substantive counts. The judgments of the lower courts should be reviewed by this Court in order to enunciate the requirements of the collateral estoppel doctrine in the circumstances presented herein, which are likely to recur in any case in which a verdict in a conspiracy trial has been vacated and a new trial is granted when the defendants have been acquitted of some or all of the substantive offenses charged in the indictment.

CONCLUSION

For these reasons, a writ of certiorari should issue to the United States Court of Appeals for the Fifth Circuit

to review the judgment of that Court which was rendered without opinion in these proceedings.

Respectfully submitted,

McPHERSON, WEBER & ZAINEY

JAMES A. McPHERSON
Attorney for Petitioner
419 Carondelet Street
New Orleans, LA 70130
Telephone: (504) 581-1973

CERTIFICATE

I, James A. McPherson, Attorney for Petitioner and a Member of the Bar of the Supreme Court of the United States, hereby certify that three copies of the foregoing petition have been served by United States Mail, first class postage prepaid, upon the Solicitor General of the United States this ____ day of May, 1980.

JAMES A. McPHERSON
Attorney for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-5210

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LEE T. WESLEY and
KENT J. SMITH, SR.,
Defendants-Appellants.

Appeals from the United States District Court for the
Western District of Louisiana

March 21, 1980

Before GOLDBERG, FRANK M. JOHNSON, JR. and HATCHETT, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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1 See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

APPENDIX B

SUPREME COURT OF THE UNITED STATES

No. A-919

LEE T. WESLEY,

Petitioner,

versus

UNITED STATES

ORDER EXTENDING TIME TO FILE
PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 20, 1980.

/s/ Lewis F.Powell, Jr.
Associate Justice of the
Supreme Court of the
United States

Dated this 29th day
of April, 1980.